

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

MAY 29 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

MELODY LYNN DAVIS,

Appellant.

)
)
) 2 CA-CR 2007-0380
) DEPARTMENT A
)

MEMORANDUM DECISION

)
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070742

Honorable Richard Nichols, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Laura P. Chiasson

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Melody Davis was convicted of one count of possession of a dangerous drug, methamphetamine, and one count of possession of drug paraphernalia, a baggie containing the methamphetamine. The trial court suspended imposition of sentence and imposed an eighteen-month term of probation. On appeal, Davis claims the court erred in precluding the admission of evidence that Davis’s codefendant previously had been convicted of other drug offenses. Finding no error, we affirm.

¶2 “We view the facts in the light most favorable to sustaining the convictions.” *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Davis was sitting in the passenger seat of a car driven by her codefendant, Lawrence McPhedran, when police officers pulled the car over for a license plate violation. One officer approached the driver’s side, saw what appeared to be methamphetamine in McPhedran’s breast pocket, and subsequently arrested him. Another officer approached the passenger-side door and saw Davis holding a “bag of chips.” When Davis saw the officer, she crumpled up the bag and stuffed it in a pocket in the door. During a subsequent search of the car, the officer found a baggie containing methamphetamine inside the bag of chips.

¶3 McPhedran and Davis were charged as codefendants in a single indictment, but McPhedran later entered into a plea agreement. He did not testify at Davis’s trial. Davis’s defense was that the methamphetamine in the bag of chips belonged to McPhedran and not to her, but she offered no evidence supporting that theory other than McPhedran’s drug possession and prior convictions.

¶4 In this appeal, Davis argues the trial court erred in precluding evidence that McPhedran had pled guilty to another incident involving possession of methamphetamine that had occurred forty-five days before the current incident, as well as evidence of McPhedran's 1992 and 2000 convictions for drug offenses. We review a trial court's decision regarding admissibility of evidence for an abuse of discretion. *State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002). We review questions of law de novo. *State v. Korovkin*, 202 Ariz. 493, ¶ 13, 47 P.3d 1131, 1135 (App. 2002).

¶5 In ruling on this issue, the trial court noted it was allowing evidence that McPhedran was found to be in possession of separate quantities of methamphetamine during the same incident that led to Davis's arrest. The court stated: "I think the general idea is that the defense is allowed to show that the driver belongs to the group of people who could and would possess methamphetamine which is accomplished by showing that he had it in his possession at the time of the arrest." Thus, the trial court found evidence that McPhedran had possessed methamphetamine was relevant to Davis's proffered defense. But the court also found that evidence of his past offenses violated Rule 404(b), Ariz. R. Evid., and was cumulative to the evidence that he possessed separate quantities of methamphetamine at the time of the arrest in this case. In addition, the court characterized McPhedran's past convictions as "remote."

¶6 Both parties assume Rule 404(b), which limits the admissibility of other-act evidence, applies to evidence of third-party culpability. But the supreme court has held:

The proper standard regarding third party culpability evidence is found in Rules 401, 402, and 403 of the Arizona Rules of Evidence. Any such evidence must simply be relevant and then subjected to the normal 403 weighing analysis between relevance, on the one hand, and prejudice or confusion on the other.

State v. Prion, 203 Ariz. 157, ¶ 22, 52 P.3d 189, 193 (2002). The court in *Prion* determined the trial court had abused its discretion in precluding such evidence, including evidence of other acts of a third party.¹ *Id.* ¶¶ 23-26. It addressed the issue only with respect to weighing relevancy against prejudice under Rules 401, 402, and 403. *Id.* ¶¶ 22, 26. It did not mention Rule 404(b) or decide that rule's applicability to such cases.

¶7 In this case, we need not decide whether Rule 404(b) is applicable when determining the admissibility of other-act evidence in the context of third-party culpability. Evidence admissible under Rule 404(b) may still be excluded under Rule 403. *See State v. Connor*, 215 Ariz. 553, ¶ 32, 161 P.3d 596, 606 (App. 2007). We review a trial court's decision to exclude evidence under Rule 403 for an abuse of discretion. *See State v. Dann*, 205 Ariz. 557, ¶ 36, 74 P.3d 231, 243 (2003). The court's findings, that McPhedran's past offenses were "cumulative and remote," were proper Rule 403 considerations.

¹According to the supreme court, the improperly excluded evidence included the following: "[The third party] was disciplined for sexually harassing female coworkers on the job; he tried to conceal his discipline from the police; he attempted to rape one of his female coworkers at his apartment after work; he had a violent temper and bit a woman's nose during a fight." *Prion*, 203 Ariz. 157, ¶ 23, 52 P.3d at 193.

Consequently, regardless of the evidence's admissibility under Rule 404(b), the trial court could have properly excluded it under Rule 403 alone.

¶8 The trial court might have reasonably, albeit implicitly, concluded that evidence of McPhedran's past drug offenses did very little to create a reasonable doubt about Davis's guilt and provided no more than a "possible ground of suspicion" that the methamphetamine in the bag of chips belonged to him rather than Davis. *Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d at 193. Additionally, the trial court's finding that the convictions were "remote" further lessens their relevance and shows they could confuse the issues or mislead the jury. *See* Ariz. R. Evid. 403. Finally, the finding that they are cumulative is a valid reason for excluding the evidence. *See id.* In light of the marginal relevance of the evidence and the trial court's findings that additional evidence was cumulative and remote, we conclude the court did not abuse its discretion in precluding the evidence.

¶9 Davis also claims that precluding this evidence violated her constitutional right to due process. But Davis did not object on due process grounds at trial, and she has thus forfeited this argument absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *see also State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("objection on one ground does not preserve the issue on another ground"). The United States Supreme Court has concluded that, generally, the Constitution does not prevent courts from precluding evidence of third-party guilt when applying "well-established rules of evidence [that] permit trial judges to exclude evidence if its probative

value is outweighed by certain other factors such as unfair prejudice, confusion of issues, or potential to mislead the jury.” *Holmes v. South Carolina*, 547 U.S. 319, 326-27 (2006). In this case, we conclude that Davis’s right to due process was not violated and thus no fundamental error occurred.

¶10 Based on the foregoing, we affirm Davis’s convictions and placement on probation.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge